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No. 04-108

IN THE

Supreme Court of the United States

SUSETTE KELO, ET AL.,

Petitioners,

v.

CITY OF NEW LONDON, ET AL.,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Connecticut

BRIEF FOR REASON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MARK A. PERRY
Counsel of Record
THOMAS H. DUPREE, JR.
DANIEL P. MUINO
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

QUESTION PRESENTED

Is the seizure of non-blighted private property a "public use" permitted under the Fifth Amendment's Takings Clause where the government intends to transfer the land to private businesses in the hope that building private homes and offices will stimulate the local economy?

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BRIEF FOR REASON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Reason Foundation, as *amicus curiae*, respectfully submits that the judgment below should be reversed.[1]

INTEREST OF *AMICUS CURIAE*

The question presented in this case is whether it is a "public use" under the Takings Clause for a city to authorize the condemnation of non-blighted private property to be handed over to private developers to build private residential and office space on the theory that such development may increase tax revenues and improve the local economy. As a national research and educational organization dedicated to advancing individual liberties, including private property rights, *amicus* Reason Foundation has an interest in the outcome of this case. Reason Foundation promotes voluntarism and individual responsibility in social and economic interactions, the rule of law, private property, limited government; and the seeking of truth via rational discourse, free inquiry, and the scientific method. The world leader in privatization, Reason Foundation is known for practical and innovative public policy ideas that emphasize competition, transparency, and accountability for results. Reason Foundation publishes *Reason*, the magazine of free minds and free markets. Reason Foundation has participated as *amicus curiae* in significant cases involving individual rights and the rule of law, including *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Ashcroft v. Raich*, No. 03-1454 (U.S. 2004).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and that no person, other than *amicus*, its members, and its counsel made a monetary contribution to the preparation of the brief. All parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk.

STATEMENT

Petitioner Wilhelmina Dery lives in a house in the Fort Trumbull neighborhood of New London, Connecticut. Pet. 1-2. She was born in the house in 1918 and has lived there her entire life. *Ibid.* She is now threatened with the loss of her home, as are her neighbors—the other petitioners in this case.

On January 18, 2000, respondent City of New London adopted the Fort Trumbull Municipal Development Plan, which was prepared by respondent New London Development Corporation ("NLDC"), a private corporation. Pet. App. 8. The development plan covers approximately ninety acres of land in the Fort Trumbull neighborhood, including fifteen properties owned by petitioners. *Id.* at 4-6. The development plan contemplates that the NLDC will own this land and lease it to private developers for the construction of residences, offices and related projects. *Id.* at 5-6.

When it adopted the development plan, the City purported to delegate to the NLDC the power of eminent domain to acquire properties within the Fort Trumbull development area. Pet. App. 8. The NLDC has sought to wield this purported authority to acquire properties in the Fort Trumbull area from owners who would not sell voluntarily, including homes owned by petitioners. *Ibid.*

To save their homes from seizure or forced sale, petitioners sued the City and the NLDC. Pet. App. 8. They alleged, among other things, that the NLDC's attempt to exercise the power of eminent domain in these circumstances violated the Takings Clause of the federal Constitution because the NLDC sought to acquire the properties for a *private*, not public, use. *Id.* at 191-92. The trial court sustained petitioners' constitutional claims as to certain properties, but denied the claims as to others. *Id.* at 9, 424. The state supreme court, by divided vote, rejected petitioners' constitutional claims with regard to *all* properties. *Id.* at 3, 28, 39, 42.

SUMMARY OF ARGUMENT

The City of New London, Connecticut has purported to authorize the NLDC, a private development corporation, to condemn property in the Fort Trumbull neighborhood, including petitioners' homes. The purpose of the proposed condemnation is to allow private developers to construct private residences, office space and other projects. Respondents contend that the NLDC's attempt to wield the eminent domain power in this fashion is for a public use because the construction of expensive condominiums and offices will supposedly help develop the local economy by generating increased tax revenues and more jobs. This "economic development" rationale, by itself, has never been recognized by this Court as a valid public use justifying the seizure of private property. Moreover, the practice of taking non-blighted property and transferring it to private parties for their own private use cannot be squared with the Court's takings jurisprudence.

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. AMEND. V. This Court has consistently enforced the "public use" limitation on the eminent domain power by holding that takings of private property for *private* use are forbidden. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937); *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 605-06 (1908); *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896).

Although this Court has never defined explicitly what constitutes a "public" use within the meaning of the Fifth Amendment, its decisions have established five categories of public uses that may justify a taking: (1) direct government use of property; (2) highways, roads and other public facilities to which the citizens have a right of access; (3) railroads,

utility lines and other facilities operated by common carriers or those acting in the manner of common carriers; (4) urban renewal plans to remedy the public nuisance created by blighted neighborhoods; and (5) Hawaiian land reform. A survey of these categories and the policies underlying them highlights the purely private character of respondents' proposed seizure of petitioners' properties.

ARGUMENT

The public use requirement of the Takings Clause is a substantive limitation on the exercise of the eminent domain power. This Court has enforced this limitation by prohibiting governments from engaging in actions that merely transfer property from one private owner to another. In *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403 (1896), for example, a group of farmers obtained an order from the Nebraska State Board of Transportation directing a railway company to permit the farmers to build a grain elevator at one of the railway stations. This Court held that the order amounted to an unconstitutional taking of private property for private use: "The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another" is unconstitutional. *Id.* at 417.

The Court has declared on many other occasions that takings of private property for private use are prohibited. *See, e.g., Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937) ("one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid"); *Hairston*, 208 U.S. at 605-06 (condemnations for private use are forbidden (collecting cases)). *See also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) ("a law that takes property from A. and gives it to B. . . . is against all reason and justice").

Recognizing that the concept is highly fact-dependent and contextual, this Court has not previously attempted a complete definition of "public use." *See Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159-60 (1896) ("what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned"). In its most recent pronouncement on the public use requirement, the Court construed the term "public use" to mean a use that is "rationally related to a conceivable public purpose." *Midkiff*, 467 U.S. at 241; *cf. Berman v. Parker*, 348 U.S. 26, 32 (1954) ("An attempt to define [the police power's] outer limits is fruitless, for each case must turn on its own facts."). But to find, as did the Connecticut Supreme Court, that the private development of property for typical private use actually qualifies as a *public* use effectively would delete the "public use" language from the Takings Clause.

An examination of the types of public uses previously approved by the Court will help illuminate the proper distinction between public and private uses under the Takings Clause, and establish that the proposed seizures in this case fall on the unconstitutional side of this line.

1. *Property Used By The Government.* It is well-settled that the government may take private property for its own use in carrying out its governmental functions. After the Civil War, the Court upheld the federal government's condemnation of portions of the Gettysburg battlefield for placement of publicly owned monuments and tablets. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 681-82 (1896). The Court declared that the taking of property by the government for its own activities was presumptively for public use:

> Where the land is taken by the government itself, there is not much ground to fear any abuse of the [eminent domain] power. . . . [When the power is delegated to a private corporation] the presumption that the intended use for which the corporation pro-

> poses to take the land is public, is not so strong as where the government intends to use the land itself.

Id. at 680. Similarly, in *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925), the Court upheld the federal government's condemnation of land for its own use. The government had leased the land during World War I and erected buildings on it for military purposes. After the war, the government tried to buy the land, but its offer was refused, leading the government to exercise its eminent domain power. The Court observed that this was a taking for public use, because the government was going to use the land to carry out its own functions – specifically, its military functions. "[T]he military purposes . . . clearly were for a public use." *Id.* at 66.

The public character of governmental use of property is manifest: the government owns the property and occupies it to perform governmental functions. Even if the facility is partially or completely closed to the public (as in the case of military bases and prisons, for example), the condemnation still fulfills a public use, because the government's own activities are presumptively undertaken for the benefit of the general public.

Obviously, the NLDC's condemnation does not fit into this category, as the condemned property will neither be owned by the government nor used for a government function.

2. *Property Used By The Public.* The government may take property to build highways, roads, public parks, and other public facilities to which the general public has a right of access. Indeed, this was the original conception of the term "public use" – that the general public was entitled to use, in a physical sense, the property in question. *See* P. Nichols, EMINENT DOMAIN § 7.02[2], at 7-26 (3d ed. 2003); Richard A. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 166 (1985) (discussing

characteristics of public goods, such as city streets and parks, that are often more efficiently provided by government).

This Court has upheld many takings of this kind. In *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923), for example, the Court upheld the taking of land on a private ranch that was needed to construct a public road. The Court explained that "a genuine highway, in fact adapted as a way of convenience or necessity for public use and travel, is a public use." *Id.* at 706. That is because "[t]hese roads will . . . be open to the general public to such extent as it can and may use them." *Id.*; *see also United States ex rel. TVA v. Welch*, 327 U.S. 546, 551-52 (1946) (condemnation of private property for transfer to the National Park Service as part of the Great Smoky Mountains National Park was a public use).

The NLDC's proposed condemnation does not fit into this category, as the property taken will not be open to the public, but will be under the complete and exclusive control of private parties.

3. *Property Used By Common Carriers.* The government may take private property for common carriers to lay railroads, deploy power or cable TV lines, or provide other services to the public. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) (taking of railroad track for use by Amtrak was public use); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916) (taking of land and water rights by Alabama Interstate Power Company was public use).

In some instances, railroad and utility companies may themselves be authorized to condemn property necessary to supply rail or utility services to the public. However, these companies must operate under the legal obligations of common carriers – that is, they must provide service to all members of the general public on equal and reasonable terms. Black's Law Dictionary defines "common carrier" as a carrier that is "generally required by law to transport . . . passengers or freight, without refusal, if the approved fare or

charge is paid." BLACK'S LAW DICTIONARY 226 (8th ed. 2004). This Court has upheld several condemnations by those acting as common carriers. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424-25 (1982) (cable TV company with exclusive franchise to provide service to all comers at a reasonable price in a nondiscriminatory manner was properly authorized to install its cables in private apartment buildings); *National R.R. Passenger Corp.*, 503 U.S. at 422 (Amtrak is a common carrier); *Mt. Vernon-Woodberry*, 240 U.S. at 32 (Alabama Interstate Power Company operated as a common carrier).

In the nineteenth century, the mill statutes of many states authorized grist mills to operate in a manner that would flood upstream lands of other property owners. The Court observed that these statutes satisfied the "public use" requirement because members of the local community were entitled to use the mills – *i.e.*, the mills operated as common carriers. *See Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 19 (1885) ("a grist mill which grinds for all comers, at tolls fixed by law, is for a public use").

Part of the concern underlying common carrier condemnations is the desire to avoid the bilateral monopoly problem that might prevent common carriers from providing public services. *See* Richard Posner, ECONOMIC ANALYSIS OF LAW 36-39 (5th ed. 1998). The problem arises, for example, when a railroad needs to acquire a series of connected land parcels in order to lay its rails. Because the railroad needs to obtain every parcel in the chain in order to build the line, each of the landowners who own the needed property has the ability to hold out for an exceedingly high price or even block the project altogether. The eminent domain power helps alleviate the otherwise intractable problems that common carrier railroads might otherwise face in building their rail systems.

Neither the NLDC nor the private parties who may eventually own the residences and offices in the Fort Trumbull neighborhood are common carriers. They will not be legally bound to serve the general public as would a common carrier.

The prospective new owners of the condemned property will be no different than any private residential or business owners. Consequently, the NLDC's condemnation does not fall into this category of public use.

4. *Property Used To Combat Blight.* The need to clear blighted buildings or slums that create public health and safety hazards may justify the use of the eminent domain power. In *Berman v. Parker*, 348 U.S. 26, 32 (1954), the Court upheld the federal government's attempt to acquire and redevelop a blighted area in the District of Columbia, reasoning that the removal of blight was a "public use" because blighted property endangered the public welfare. Some state supreme courts have similarly likened blighted areas to a public nuisance. *See Randolph v. Wilmington Housing Auth.*, 139 A.2d 476, 482 (Del. 1958) (the "elimination of slums" is "the abatement of a public nuisance" and therefore a public use); *Allydonn Realty Corp. v. Holyoke Housing Auth.*, 23 N.E.2d 665, 668 (Mass. 1939) ("The analogy between a slum and a public nuisance cannot be overlooked.").

Although the *Berman* Court permitted a non-blighted department store to be taken as part of the project, the Court emphasized that this was essential to achieving the public purpose of "eliminat[ing] the conditions that cause slums." 348 U.S. at 34. The case thus offers no basis for taking non-blighted property outside the context of "slum clearance and prevention." *Id.* at 31.

Here, of course, there is no suggestion that the Fort Trumbull neighborhood was blighted. The neighborhood did not possess any of the characteristics of the properties at issue in *Berman*: there was no "overcrowding of dwellings," "lack of parks," "lack of adequate streets and alleys," "absence of recreational areas," "lack of light and air," or "presence of outmoded street patterns." 348 U.S. at 34. Indeed, the NLDC did not bring its condemnation actions under Connecticut's urban renewal law (Conn. Gen. Stat. Chapter 130, §§ 8-124, *et seq.*), which permits the use of eminent domain to clear slums or blighted areas, but rather under

Conn. Gen. Stat. Chapter 132, §§ 8-186, *et seq.*, which governs Municipal Development Projects. The condemnation was not aimed at removing blight, but at transferring desirable land in a prime location to a private developer for its own private use.

5. *Property Used For Land Reform.* This Court recognized a very unusual type of "public use" in the case of *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984). As the Court explained, the early Polynesian immigrants who settled the Hawaiian Islands had established a feudal system which divided the islands into large estates held by a small group of nobles. The concentration of land ownership survived Hawaiian statehood and led to a situation in which a small group of landholders held the vast majority of the state's non-governmental land. The Hawaii legislature found that the land oligopoly distorted the market for residential property, caused a shortage of fee simple residential lots, and inflated residential land prices. It enacted the Hawaii Land Reform Act of 1967 to transfer residential lots from landowners to their lessees, and this Court found that the Act served a valid public purpose: "The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs." *Id.* at 241-42 (footnote omitted).

The land reform at issue in *Midkiff* does not delineate a broad category of public use, but rather a one-time solution to a unique problem arising from the peculiarities of Hawaiian history. Were governments to redistribute land every time they perceived an inequity in distribution, the consequence would be substantial instability in real estate markets. *See* Nick Dancaescu, *Land Reform in Zimbabwe*, 15 Fla. J. Int'l L. 615, 633 (2003) (discussing how land redistribution in Zimbabwe has created great insecurity in land rights, severely damaging agricultural productivity).

The NLDC's condemnation in this case is nothing like the one in *Midkiff*. The NLDC's development plan was not

designed to remedy excessive land concentration left over from an earlier politico-economic system. Instead, the plan merely transfers the Fort Trumbull property from one set of private owners to another, without any justification beyond the desire to generate more tax revenues and jobs.

* * *

The Fifth Amendment demands a more rigorous judicial inquiry than simply asking whether the government has declared a particular exaction to be a "public use." This Court's takings jurisprudence provides a useful guide as to what constitutes a legitimate public use, and as shown above, the proposed condemnation in this case cannot be upheld by reference to any of this Court's prior rulings.

The Takings Clause safeguards the rights of citizens in their own property by limiting the government's right to take that property to those circumstances in which the government puts the property to "public use" (and pays just compensation). That respondents may view the proposed development in this case as beneficial – in the form of increased tax revenue and a strengthened local economy – cannot alter the private nature of the use. This is simply an attempted transfer of property from one set of private owners to another. Declaring this use to be public would deprive the "public use" language in the Takings Clause of any constraining force.

CONCLUSION

The judgment of the Connecticut Supreme Court should be reversed.

Respectfully submitted.

MARK A. PERRY
Counsel of Record
THOMAS H. DUPREE, JR.
DANIEL P. MUINO
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

December 3, 2004.